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September 25, 1997

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Hon. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Telecommunications Pole Attachment Rates, CS Docket No. 97-151, Notice of Proposed Rulemaking, FCC 97-234

Dear Secretary Caton:

The Cable Television and Telecommunications Association of New York, Inc., (CTTANY or Association) submits the following limited comments in response to the Federal Communications Commission's August 12, 1997, Notice of Proposed Rulemaking (NOPR), FCC 97-234. The NOPR seeks comment on various proposals for mechanisms and conventions to be used in setting pole and conduit attachment rates for wires and equipment used to provide telecommunications services.

CTTANY is a trade association representing the interests of franchised cable television companies in New York State and their affiliates that seek to enter the telephone business. Historically, New York State has established its own rates and policies for pole attachments, pursuant to New York Public Service Law §119-a, which prescribes the parameters to be used by the New York Public Service Commission (PSC) for setting such rates, and Communications Act §224(c), which generally precludes this Commission from regulating pole attachment rates and terms where such rates and terms are regulated by a state. Nonetheless, as an exercise of its independent regulatory authority, the New York PSC determined earlier this year that it would apply the Federal approach to pole attachment rates and operations in New York.[1] Accordingly, the rules adopted in this

[1] In The Matter Of Certain Pole Attachment Issues Which Arose In Case 94-C-0095, NY PSC Case 95-C-0341, Opinion and Order Setting Pole Attachment Rates, Opinion No. 97-10 (Op. No. 97-10), issued June 17, 1997, at 7.

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proceeding for attachment rates for equipment used to provide telecommunications services will directly affect the cable television companies in New York State and the telephone companies affiliated with such cable companies.

One of the New York Commission's key objectives in adopting the Federal ratemaking approach was to simplify the regulation of pole attachment matters and thereby encourage telecommunications competition and stimulate economic development. Id., 5, 19. The New York Commission's stance was grounded in the very real concern that new telecommunications entrants, which are critical to new investment, network diversity, and innovation, can be deterred by regulations that are complex to understand or difficult to negotiate.

This same view should guide the FCC in considering the pole attachment rate rules which will confront new telecommunications service providers. To the extent that new telecommunications market entrants find access to essential pole attachment space and other pathway facilities to be simple, affordable, and non-discriminatory, competition will grow, the overall economy of the nation will be strengthened, and the goals of the 1996 Telecommunications Act will more rapidly be realized.

CTTANY's specific recommendations follow. In addition, CTTANY recommends that the Commission adopt rules consistent with the comments submitted in this proceeding by the National Cable Television Association (NCTA) and Comcast Corporation, et al..

I. There Should Be No Policy Requiring Negotiated Agreements Or Conditioning An Attacher's Request For Commission-Set Rates.

Pursuant to §224(e)(1), the regulations adopted under Section 224(e) will be used to calculate telecommunications attachment rates when parties fail to resolve a dispute over such charges. NOPR ¶¶9 and 12. The NOPR expresses the view that negotiations between a pole owner and an attacher "should continue to be the primary means by which pole attachment issues are resolved." To this end, the NOPR proposes that parties seeking Commission-set rates first attempt to negotiate a rate and then either summarize all steps taken to negotiate the rate or explain why such steps would be fruitless. This precondition, set forth in 47 CFR §1.1404(i), currently applies to all parties asking the Commission to fix pole attachment rates. NOPR ¶12 and fn 32.

CTTANY does not oppose negotiated rate agreements, but does oppose procedural obstacles that could delay a prompt determination by the Commission of telecommunications pole attachment rates. Since pole owners generally have vastly greater bargaining power than attaching parties, a pole owner's failure to resolve a dispute with a cable television provider would most likely be motivated by a desire to extract greater monopoly rents. By contrast, telecommunications attachers seek to compete directly against incumbent telephone companies, which usually, if not universally, have joint operating agreements with electric utility pole owners to control access to poles. This fact could prolong pole attachment disputes and thereby delay a potential pole attacher from satisfying the procedural preconditions to seeking the Commission's assistance.

The 1996 Telecommunications Act does <u>not</u> express a policy <u>preferring</u> negotiated agreements, nor does it flatly require elaborate demonstrations of efforts made to resolve disputes as a precondition to seeking Commission-set rates. It acknowledges the desirability for negotiated arrangements, but clearly establishes the regulatory "backstop" of a maximum rate formula and swift and sure adjudication of disputes through Federal and state pole complaint procedures. At its heart, the goal of the Act is to accelerate competition in local telecommunications competition. It is against this objective that the proposed preference and procedural precondition should be examined.

The bargaining position of a pole owner reluctant to reach resolution with a telecommunications attacher could be further strengthened by a Commission policy favoring negotiated agreements and burdensome preconditions for attachers to obtain Commission-set rates. Pole owners could employ such policies to argue, in opposition to attacher requests for relief, that Commission action would be premature so long as additional avenues and opportunities for negotiation might be pursued. In sum, such a policy of near-endless exhaustive negotiations could be used to frustrate, hamper, and delay deployment of telecommunications attachments.

By contrast, the prospects for negotiated agreements would be substantially improved if the Commission adopted a "no-nonsense" policy of standing ready to promptly apply, as it has, and as it is required by Congress, the telecommunications ratemaking formula whenever requested to do so by an attaching party, without any preconditions. Such a policy would remove any incentive for a pole owner to protract negotiations with respect to rates, and, quite likely, would eliminate any basis for protracting attachment negotiations.

For these reasons, the preconditions of 47 CFR §1.1404(i) should not be applied to requests for Commission-set telecommunications attachment rates.

II. Pole Owners Should Not Be Permitted To Condition Or Limit The Uses Of Telecommunications Attachments, Except With Respect To Bona Fide Applicable Safety, Reliability, and Engineering Standards.

The NOPR seeks comment as to whether pole owners should condition or limit uses of attachment space when such uses otherwise conform to applicable safety, reliability, and engineering standards. Id. ¶13. The Commission should prohibit such conditions and limitations.

As the NOPR observes, the Commission has historically disapproved of efforts by pole owners to restrict the type of equipment attached by cable operators.[2] This sound policy should continue, for three reasons.

First, advances in telecommunications science will inevitably render today's facilities technologically obsolete. Pole owner restrictions limiting the type of facilities occupying attachment space can retard the normal evolution of telecommunications facilities.

Second, and more fundamentally, the telecommunications rate should reflect the cost of space occupied, not how the space is used. Congress mandated that the telecommunications rate be cost-based, rather than "value-based," so that new entrants willing to risk capital and new technologies to provide telecommunications services could be assured affordable and predictable rates for access to poles and other essential pathway resources. If new technologies are not eligible for the cost-based telecommunications attachment rate, the entities that control such poles and pathway resources may seek to exercise their monopoly power to compel payment of rates that vastly exceed compensatory levels. Such a circumstance would dramatically alter the economics of entering the telecommunications market, and the mere prospect of such a circumstance would deter entrepreneurs from considering market entry.

Third, the Commission should view with great skepticism utility claims that overlashes must be limited through advance permitting and notice, or other means. While the Commission has reasonably anticipated that utilities will advance claims that poles have broken as a direct result of overlashed communication conductors, it will be difficult, if not impossible to prove such

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[2] Id., citing Heritage Cablevision Assocs. of Dallas, L.P. vs. Texas Utils. Elec. Co., 6 FCC Rcd 7099 (1991), recon. dismissed, 7 FCC Rcd 4192, aff'd sub nom. Texas Utils. Elec. Co. vs. FCC, 997 F 2d 925 (DC Cir 1993).

pole losses are attributable to overlashing. More to the point, however, the relative handful (or theoretical possibility) of such cases that the utilities may identify (assuming a causal link between communications attachments and broken poles) does not justify across-the-board restrictions on overlashing. The threat, we believe, is not to safe engineering practices or to public safety, but to competition.

For these reasons, the Commission should prevent the intrusion of anti-competitive and anti-market concepts such as "value-added" charges and restrictions on overlashing, so that broadband networks may continue to flourish.

III. The Presumptions For Calculating Telecommunications Attachment Charges Should Be The Same As Those Currently Applied In Calculating The Cable Pole Attachment Rate.

Currently, cable pole attachment rates are calculated by applying the presumptions noted in NOPR ¶¶16 and 20. These presumptions have been in use for many years and are highly beneficial because, as stated in NOPR ¶19, they eliminate the need to develop data bases for individual utilities. CTTANY urges the Commission to retain these presumptions and extend their applicability to the calculation of telecommunications attachment rates, in a manner consistent with the comments filed by NCTA and Comcast Corporation, et al., in this proceeding. CTTANY, however, seeks to comment specifically on some items raised in the NOPR.

CTTANY opposes the combination of changes to the presumptions regarding the lengths of pole and usable space proposed by the electric industry Whitepaper. Specifically, the electric industry seeks both to increase the presumed average height of poles from 37.5 feet to 40 feet and decrease the presumed average amount of usable space on poles from 13.5 feet to 11 feet. NOPR ¶17. The proposed changes would, if adopted, increase the percentage of usable space assigned to attachers and thereby increase the share of total pole costs borne by attachers.

The electric industry's proposal is neither factually correct nor economically efficient. First, the electric industry errs in its claim of an inverse relationship between pole height and usable space. To the contrary, as shown in the following table, which we believe to be representative of poles throughout the Nation, there is a direct proportional relationship between pole height and usable space:

Table 1[3]

Pole Height	Ground Set	Clearance[4]	Presumed Usable Space
30	5	18	7
35	6	18	11
40	6	18	16
45	6.5	18	20.5
50	7	18	25
55	7.5	18	29.5

Second, if average pole heights are increasing, the direct cause is the fact that electric poles are increasing in height to accommodate increasing demand for electric energy and the concomitant need of electric utilities for more wire of greater capacity and attendant appurtenances and equipment. Although the demand for telecommunications services also has been increasing, significant advances in the technology of transporting telecommunications, particularly fiber-optic cables, have dramatically reduced the amount, size, and weight of attached telecommunications wire. By contrast, increased demands for electricity must be satisfied with proportionately greater amounts of wire attachments.

In view of the fact that increasing demand for electric service is driving up the average height of poles carrying electric wires, we would support a presumption that poles bearing electric wires have a greater length, so long as it was also presumed that such larger poles have concomitantly larger lengths of usable space. Thus, for example, by referring to Table 1, if poles carrying electric wires are presumed, on average, to be 40 feet in length, the corresponding usable space would necessarily be 16 feet.

We also oppose suggested changes, referenced in NOPR ¶18, that would complicate the Commission's presumptions by introducing such factors as weight and wind load. The virtue of the current presumptions is in their ability to simplify, in a fair manner, the calculation of pole attachment costs to such an

[3] All values are in feet.

[4] As noted in NOPR ¶16, an 18-foot margin must be reserved for ground clearance to comply with National Electric Safety Code standards for pole construction.

extent that the rate formula is virtually self-administering.

Changes that have the effect of increasing potential points of disagreement between pole owners and attachers, even if arguably shown to improve precision in cost allocations, would prove counter-productive if they ultimately cause delays in the deployment of telecommunications facilities and the diversion of resources to regulatory activities. For these reasons, the Commission should not increase the number of factors considered in calculating pole attachment rates.

IV. The Telecommunications Rate Formula Should Recognize The Characteristics Of Pole Plant And The Marketplace And Be Easy To Administer.

The Commission has tentatively concluded that any telecommunications carrier, cable operator, or LEC attaching to a pole would be counted as a separate entity for the purposes of the apportionment of two-thirds of the costs of the non-usable space and such costs will be apportioned equally to all attaching entities. NOPR ¶22. We agree with this conclusion.

We also agree that parties with separately stranded attachments occupying their own (one foot) of attachment space should be responsible for a proportionate share of such space, as well as non-usable space.

Finally, to the extent that a party's facilities are affixed to poles by means of an additional strand, and occupy an additional foot of attachment space, that entity should be responsible for two feet of usable space, but should not be double-charged for the support (non-usable) space.

With specific reference to overlashed attachments, we believe that cable operators should not be charged for overlashed attachments, and that such overlashes should not be included as attachments for the purposes of calculating non-usable (or usable) space. This would be true for overlashed conductors to provide, in part or in whole, traditional cable television services, or for overlashed attachments owned by the cable operator and used exclusively by third parties.

On the other hand, if a cable operator permits a third party to overlash its own conductor to the cable operator's strand (and we believe that the Commission should adopt a rule forbidding a pole owner from prohibiting this practice), then that third party would be responsible for paying a proportional share of the non-usable pole space. In this case, however, this party would not bear any responsibility for usable space since this party occupies no space beyond the one foot allocated to the underlying strand owner. We believe that this approach both fairly allows for maximum efficient usage of available pole space, and adequately compensates the pole owner for the third-party use of that space.

With respect to the administration of the new telecommunications rate, if rates were subject to change whenever there was change in the number of parties leasing dark fiber, or otherwise sharing the space leased by an attaching party, the rates would be highly volatile and unpredictable, and considerable effort would have to be devoted to monitoring the number of "entities" benefitting from capacity or services within each attached party's network to assure that the allocation of pole costs is current. Such a regulatory requirement would be laborious, could trigger recurrent controversies, and ultimately discourage investment by entrepreneurs seeking predictable rates and stable regulatory conditions.

More fundamentally, however, the telecommunications rate should not apply to high-speed Internet access services supplied over a cable system, because such services are defined as cable services under the Communications Act. 47 USC §522(6) and (14). Finally, the fact that a cable operator may be offering telecommunications services to discrete customers in discrete parts of its cable system should not trigger a telecommunications rate across all poles in that system.

For these reasons, the telecommunications rate should be based upon the principle that the rate will only apply to entities that attach equipment directly to poles and such equipment, in fact, is providing telecommunications service. Under such a policy, there would be comparatively little demand for the Commission to revise telecommunications rates, and pole owners would need to deal with fewer entities to recover the costs assigned to pole attachers. Further, by eliminating any regulatory burdens for firms which do not attach equipment to pole, but benefit from the presence of attachments, such a policy would best serve the goal of maximizing the attractiveness of market entry to the broadest number and range of telecommunications service providers.

Respectfully submitted,

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